TNT Technologies Ltd, d/b/a Ambrose Electric *and* Local 724, International Brotherhood of Electrical Workers, AFL-CIO. Case 3-CA-20165-1

November 22, 1999

### **DECISION AND ORDER**

# By Chairman Truesdale and Members Fox and Liebman

On July 18, 1997, Administrative Law Judge Michael A. Marcionese issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

1. The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by attempting to exclude union representatives from jobsites to which the Respondent lacked the right to control access. The judge recommended dismissal of this allegation. The General Counsel has excepted, and we find merit in the exception.

On April 15, 1996, Union Organizer William Paley saw one of the Respondent's employees working on electric light poles in a church parking lot. Thinking that the employee was employed by one of the Union's signatory contractors, Paley went over to talk to him. On learning that the employee actually was employed by the Respondent, a nonunion employer, Paley talked to him about the benefits of union representation. Paley also helped him with a problem he was having with a man-lift.

Peter Will, president of the Respondent, testified that he learned of the April 15 episode the same day from the employee involved. Will asked the employee if Paley had touched the Respondent's equipment, and the employee said that he had. The next day, in a telephone conversation, Will told Paley that he would not allow Paley to touch any of the Respondent's equipment or to be near the jobsite where it would create any kind of safety concern. Will explained to Paley that he understood that Paley had the right to talk to his employees and that he was not blocking that right in any way. His

concerns, rather, were about his employees getting their work done and being safe on the jobsite.<sup>2</sup>

By letter dated April 25, 1996, the Respondent's attorney informed Paley, in pertinent part, that:

It has been brought to my attention that you and other organizers for IBEW Local 724 have been present at several Ambrose Electric job sites in the Capital District during the past several months pursuing your efforts to organize the Ambrose Electric work force. Please be advised that the work force of Ambrose Electric is expected to devote their full energy and attention to performance of their work during working hours. In addition, it is my understanding that you have attempted to participate in the work by "assisting" an employee with a lift device on Hackett Boulevard within the past two weeks. As you must be aware, there are numerous concerns, including liability, which are implicated by such conduct. In short, I must insist that you limit your efforts to times other than working hours and locations other than the job sites where Ambrose Electric is performing contracts.

Should there be any questions in this regard, you may feel free to call upon me. Otherwise your compliance will be expected.

Paley did not communicate further with the Respondent or the attorney, and he conceded that he had been able to contact other employees of the Respondent at other locations.

The General Counsel contends that the April 25 letter violated Section 8(a)(1). The judge disagreed. He noted that when an employer attempts to prevent nonemployee union representatives from exercising Section 7 rights on private property, the Board first requires the employer to demonstrate that it has a property interest that entitles it to exclude individuals from the property.<sup>3</sup> The judge noted that the Respondent did not contend that it owned the church property on which Paley had communicated with the employee; rather, the Respondent was on the property of another to do work it had contracted to do. The judge further found no indication that the church, by contracting with the Respondent, had intended to invite third parties onto the property. He also found that, in any event, the Respondent had at least a property right with regard to the equipment the employee was using on the jobsite and an interest in insuring that the employee was, in fact, working. Finding, on those facts, that the Respondent had met the threshold requirement of establish-

<sup>&</sup>lt;sup>1</sup> The General Counsel has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The complete citation to *Belfance Electric*, cited in the judge's decision, is 319 NLRB 945 (1995).

<sup>&</sup>lt;sup>2</sup> The foregoing is based on Will's credited testimony.

<sup>&</sup>lt;sup>3</sup> Food for Less, 318 NLRB 646, 649 (1995), modified on other grounds 95 F.3d 733 (8th Cir. 1996); Bristol Farms, 311 NLRB 437 (1993). Normally, an employer violates Sec. 8(a)(1) if it attempts to exclude union representatives from property it does not own and to which it does not control access, as long as the union representatives are engaged in activity protected by Sec. 7. See, e.g., Bristol Farms, 311 NLRB at 438. The Union's organizing activities were clearly protected by Sec. 7, and the Respondent does not contend otherwise.

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ing an exclusionary property right, the judge found that the Respondent had not violated Section 8(a)(1) because Paley admitted that he had been able to contact the Respondent's employees elsewhere.<sup>4</sup>

The judge went on to find that, assuming that the Respondent lacked an exclusionary property right, it still had not acted unlawfully. He found that the April 25 letter, read in the context of Will's earlier telephone conversation with Paley, did not deny the Union access to the Respondent's employees, but merely limited access to times and places at which the Respondent's legitimate concerns over safety, liability, and job performance would not be compromised. He found that the limitations imposed on Paley were not discriminatorily motivated and were consistent with precedent allowing employers to limit solicitation to times at which employees are not working.

Contrary to the judge, we agree with the General Counsel that the Respondent's letter violated Section 8(a)(1). To begin with, we find that the Respondent failed to show that it had the right to exclude the Union from any of its jobsites. In this regard, we do not agree with the judge's finding that the Respondent's property right with respect to its equipment and its interest in ensuring that its employees were actually working constitute such a showing.<sup>5</sup> To be sure, the Respondent has a legitimate interest in workplace safety and in its employees' diligently working when they are supposed to be working. It therefore is entitled to insist that third parties, including union representatives, stay off of its equipment and not interfere with its employees while they are working, whether or not the Respondent has an interest that would enable it to exclude others from the jobsite altogether.<sup>6</sup> Had the Respondent so limited its restrictions, its letter would have been lawful.

But the letter went further than that. Instead of instructing the Union not to approach its employees while they were actually working, it insisted that approaches be made during times "other than working hours"—an expression that encompasses nonworking periods such as lunch and coffee breaks, as well as actual working time, and is presumptively invalid. The Respondent's spatial restriction on access is equally overbroad. Its letter instructs the Union to approach its employees only at "locations other than the job sites where Ambrose Electric is performing contracts." In the absence of further explanation, this vague language could reasonably be construed to mean that the Union was excluded from any property

on which the Respondent was working, regardless of proximity to the work being done or the equipment being used. With respect to the church job, the Union could reasonably interpret the Respondent's letter as meaning that its representatives were barred, not simply from the immediate vicinity of the work in progress, but from being anywhere on the church property. Thus, if a lunch wagon parked in the church parking lot, well away from the Respondent's equipment, and the Respondent's employees patronized the wagon on their lunch hour, the Union's representatives reasonably could think that they were precluded from speaking to the employees even around the lunch wagon during their lunchbreak.

The judge was correct in analyzing the contents of the letter in light of Will's earlier statements to Paley over the telephone. Even a facially overbroad no-solicitation rule is only presumptively invalid; an employer may show by extrinsic evidence that such a rule was communicated in such a way as to convey an intent to permit solicitation during periods when employees are not actively at work.9 We cannot find, however, that Will's statements to Paley communicated any such intent. Will told Paley specifically not to touch the equipment, and he talked in general terms about his concern for safety and for employees' getting the work done. But he said nothing about allowing the Union to approach employees during their nonworking time, and he told Paley that he was not allowed *near* the jobsite where it would create a safety concern. Moreover, Will's oral statements were followed by the letter, which came from the Respondent's attorney. We find that a person, on receiving a letter of that sort, would reasonably take the letter, and not the earlier oral statements, to be the definitive version of the Respondent's position. Thus, even if we were to find that Will's statements would have been permissible had the letter not been sent, we cannot conclude that they mitigated the effect of the unlawful statements in the letter.

In sum, having failed to establish an exclusionary property interest with regard to its jobsites, the Respondent was entitled to insist only that the Union's representatives not touch or interfere with its equipment, and not approach its employees while they were engaged in their work duties. By going further than that, and insisting that the union representatives stay off the jobsites entirely and away from the employees even during their

<sup>&</sup>lt;sup>4</sup> See Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992).

<sup>&</sup>lt;sup>5</sup> Cf. Food for Less, supra.

<sup>&</sup>lt;sup>6</sup> See, e.g., *Great American*, 322 NLRB 17, 21 (1996) (employer lawfully excluded union handbillers from property not owned by the employer, where the handbilling interfered with vehicular traffic, causing potentially dangerous traffic backups and interfering with customers' access to the employer's premises).

<sup>&</sup>lt;sup>7</sup> Our Way, Inc., 268 NLRB 394 (1983).

<sup>&</sup>lt;sup>8</sup> See *Laidlaw Transit, Inc.*, 315 NLRB 79, 82 (1994), in which the Board found that a rule prohibiting solicitation and distribution on "company property" was presumptively invalid because the expression could be construed as including breakrooms or cafeterias where employees did not perform work activities. Here, the Respondent's rule was, a fortiori, overly broad in that it applied to entire jobsites that were not even the Respondent's property.

<sup>&</sup>lt;sup>9</sup> Our Way, Inc., 268 NLRB at 395 fn. 6.

nonworking time, the Respondent violated Section 8(a)(1). 10

2. The complaint also alleges that the Respondent violated Section 8(a)(3) by failing to hire, or to consider for hire, five Union members who applied for jobs with the Respondent. The judge found that the Respondent's failure to hire or consider any of the five applicants was not caused in any way by their union affiliation. We agree with the judge, despite our finding that the Respondent violated Section 8(a)(1) as discussed above. Although the Respondent's letter contained an overly broad denial of access to its employees, neither the letter nor Will's earlier statements to Paley indicate that animus against the Union was a motivating factor in the Respondent's hiring decisions. Indeed, Will assured Paley that he understood that Paley had the right to talk to the Respondent's employees and that he was not attempting to block that right. The Respondent's only concerns—over safety, liability, and work performance-were legitimate and clearly communicated. We therefore find, in agreement with the judge, that the General Counsel failed to prove that animus against the applicants' union affiliation was a motivating factor in the Respondent's failure to hire or to consider them, and we affirm his recommended dismissal of the 8(a)(3) allegation.11

# AMENDED CONCLUSIONS OF LAW

- 1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
- 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

Because we agree with the judge that antiunion animus was not a factor in the Respondent's employment decisions, we find it unnecessary to decide whether he correctly found that the Respondent lacked knowledge of applicant Edward Ruede's union affiliation. However, we disavow the judge's discussion to the extent that it suggests that employer knowledge of an applicant's union affiliation cannot be inferred from an employment application that shows previous employment with union contractors. *BE & K Construction Co.*, 321 NLRB 561 (1996), does not stand for that proposition.

Although we agree with the judge that, in the circumstances presented here, the Respondent's reliance on screening criteria such as applicants' previous wage rates and duration of employment is not evidence of antiunion animus, there may be other circumstances in which the Board could draw a different conclusion. See, e.g., *Norman King Electric*, 324 NLRB 1077 (1997).

- 3. By attempting to deny union representatives access to its employees on jobsites to which it lacked the right to control access, during nonworking time and on portions of such jobsites where the representatives would not pose a threat to safety or interfere with the Respondent's equipment or with its employees in the performance of their job duties, the Respondent violated Section 8(a)(1) of the Act.
- 4. The Respondent has not violated the Act in any other manner encompassed by the complaint.

#### REMEDY

Having found that the Respondent engaged in unfair labor practices as described above, we shall order it to cease and desist and to take certain affirmative action necessary to effectuate the policies of the Act.

### **ORDER**

The National Labor Relations Board orders that the Respondent, TNT Technologies Ltd, d/b/a Ambrose Electric, Latham, New York, its officers, agents, successors, and assigns, shall

- 1. Cease and desist from
- (a) Attempting to deny union representatives access to its employees on jobsites to which it lacked the right to control access, during nonworking time and on portions of such jobsites where the representatives would not pose a threat to safety or interfere with the Respondent's equipment or with its employees in the performance of their job duties.
- (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- 2. Take the following affirmative action necessary to effectuate the policies of the Act.
- (a) Within 14 days after service by the Region, post at its facility at Latham, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 25, 1996.

We recognize that the complaint alleges only an unlawful attempt to deny the Union access to property, not specifically to the Respondent's employees. But of course the problem was that Paley had gone on the church property to talk to one of the Respondent's employees. The issue of access to property is thus inextricably bound up with the issue of access to employees, as the Respondent's statements to the Union make clear. Indeed, access to the jobsites would be useless unless the Union could contact the employees during nonworking time. Moreover, both matters were fully litigated at the hearing. We therefore find that the Respondent's temporal restriction, as well as the spatial one, was unlawful.

<sup>&</sup>lt;sup>12</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

## **APPENDIX**

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT attempt to deny union representatives access to our employees on jobsites to which we lack the right to control access, during nonworking time and on portions of such jobsites where the representatives would not pose a threat to safety or interfere with our equipment or with our employees in the performance of their job duties.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

TNT TECHNOLOGIES LTD, D/B/A AMBROSE ELECTRIC

Alfred M. Norek, Esq., for the General Counsel. Robert L. Adams, Esq., for the Respondent. Timothy M. Paley, for the Charging Party.

# **DECISION**

## STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in Albany, New York, on May 12, 1997. The charge was filed July 8, 1996, and the complaint was issued November 8, 1996.

The complaint alleges, and Respondent denies, that Respondent violated Section 8(a)(1) of the Act, on or about April 25, by seeking to exclude representatives of the Charging Party Union from jobsites on which Respondent lacked the right to control access; and Section 8(a)(1) and (3) of the Act by refusing to hire and/or consider for hire five named employee-applicants on various dates in March.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

The Respondent, a corporation, with its principal office and place of business in Latham, New York, is an electrical contractor in the building and construction industry. Respondent annually provides services valued in excess of \$50,000 to other

enterprises, such as Golub Corporation and Freihofer Baking Company, which are directly engaged in interstate commerce. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on the parties' stipulation at the hearing, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

#### II. ALLEGED UNFAIR LABOR PRACTICES

## A. Denial of Access

On April 15, William Paley, the Union's organizer, came across one of Respondent's employees working on electric light poles in a church parking lot on Hackett Boulevard.<sup>2</sup> Paley testified that he stopped to talk to the employee because he thought it was one of the Union's signatory contractors. Upon learning that he was an employee of Respondent, Paley spoke to him about the benefits of union representation. Paley also helped the employee to stabilize a man-lift which was stuck in the mud. When Palev returned to his office, there was a message for him that Respondent's president, Peter Will, had called on the afternoon of April 15 and wanted Paley to call him back. When Paley returned Will's call, on April 16, Will told Paley that he had to stay away from Respondent's employees. Paley testified further that Will told him that he was thinking of becoming signatory with the Union but that Paley had "f-ed the whole deal up." Thereafter, Paley received a letter dated April 25 from Respondent's attorney advising Paley that it had been brought to his attention that Paley and other organizers for the Union had been present on several of Respondent's jobsites. seeking to organize Respondent's employees and that Paley had attempted to participate in the work of Respondent's employees by "assisting" an employee with a lift device on Hackett Boulevard. Respondent's attorney then stated in the letter:

As you must be aware, there are numerous concerns, including liability, which are implicated by such conduct. In short, I must insist that you limit your efforts to times other than working hours and locations other than the job sites where Ambrose Electric is performing contracts.

Although the letter invited Paley to contact Respondent's attorney if he had any questions, Paley had no further contact with Respondent or its representatives. Paley conceded on cross-examination that he has had access to Respondent's employees, in public places during nonwork times, since receiving the April 25 letter.

Will testified that he learned of the incident on Hackett Boulevard from the employee involved when the employee returned to Respondent's shop. According to Will, he asked the employee if Paley touched the equipment because of concerns over insurance and liability. When the employee said that Paley did, Will called Paley immediately. Paley was not in but returned the call the next day. Will's version of this conversation is that he told Paley that he was not allowed to touch any of Respondent's equipment or be near a jobsite where it would create a safety concern. Will further testified that he told Paley he understood that Paley had a right to talk to Respondent's employees and that he did not want to block Paley in any way, but that Will was concerned about his employees getting their

<sup>&</sup>lt;sup>1</sup> All dates are in 1996 unless otherwise indicated.

<sup>&</sup>lt;sup>2</sup> Peter G. Will, Respondent's president, testified that Respondent had been hired by the church to change or fix a light in the parking lot.

work done and being safe on the job and about protecting the site. Will then had his attorney send the April 25 letter to Paley.

I credit Will's testimony regarding this conversation. In light of the undisputed evidence that Respondent had previously declined voluntary recognition, I find it incredible that Will would have told Paley that he was considering becoming signatory. I find it more likely that Will was concerned about Paley's having touched his equipment and talked to his employee while the employee was working and that he expressed those concerns to Paley. The fact that these are the same concerns expressed in the April 25 letter from Respondent's attorney further supports the credibility of Will's testimony.

The complaint alleges that Respondent denied the Union access to jobsites over which Respondent lacked the right to control access, in violation of Section 8(a)(1) of the Act. This allegation is based solely on the April 25 letter from Respondent's counsel to Paley. The General Counsel argues on brief that "absent a property right, a general contractor may not deny access to a job site by union officials seeking to communicate with its employees." This argument overstates the law regarding the rights of nonemployee union organizers to communicate with employees at work while they are working.

The cases relied on by the General Counsel to establish a violation here are inapposite. In Payless Drug Stores, 311 NLRB 678 (1993), the Board relied on California law to find that the owners of a shopping mall have no right to deny access to individuals seeking to handbill customers of the mall. In CDK Contracting Co., 308 NLRB 1117 (1992); and C. E. Wylie Construction Co., 295 NLRB 1050 (1989), the general contractor at a construction site was found to have no right to deny union representatives access to the site to communicate with employees of subcontractors whom the union represented. The subcontractors in both cases had collective-bargaining agreements with the union granting access to unit employees and job sites to administer the agreement and police it. The Board reasoned that by inviting the subcontractors onto the site, the general contractor subjected whatever property rights it had to the terms of the subcontractors' agreements with the unions. None of these factors are present here. There is no evidence in the record regarding New York law defining the property rights of a contractor hired to do work on another's property. There is no contention that the Union was the designated collectivebargaining representative of Respondent's employees, or had any agreements with Respondent or the owner of the parking lot granting it rights of access beyond those enjoyed by the general public.

The lead case defining the rights of nonemployee organizers to access to an Employer's unrepresented employees is still NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956). In that case, the Supreme Court distinguished between the rights of employees to engage in union activity on an employer's premises and the rights of nonemployees, holding that an employer cannot be compelled to allow distribution of union literature by nonemployees on his property except in those circumstances where the employees are beyond the reach of reasonable efforts to communicate with them. More recently, in Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992), the Court reaffirmed its interpretation of the Act as drawing a substantive distinction between the union activities of employees and those of nonemployee organizers, and upheld an employer's right to exclude nonemployee

organizers except in certain limited circumstances.<sup>3</sup> The Board, in applying *Babcock & Wilcox* and *Lechmere*, has required the Employer to make a threshold showing that it had a property interest which would entitle it to exclude individuals even absent Section 7 activity. *Bristol Farms*, 311 NLRB 437 (1993). The Board generally looks to state law to determine the nature and extent of the Employer's property rights.

In this case, there is no dispute that Respondent did not own the church parking lot where Paley communicated with Respondent's employee and assisted him in freeing the stuck equipment. Rather, Respondent was on the property of another for the limited purpose of carrying out the work it contracted to do for the owner. There is no indication that the property owner, by hiring Respondent, intended to invite third parties onto its property. Moreover, Respondent had at least a property right with respect to the equipment which was located on the iobsite and an interest in ensuring that employees it assigned to perform work at the site were in fact working.<sup>4</sup> I find that these interests meet the threshold showing required by Bristol Farms as a predicate to triggering the *Lechmere* analysis. Applying the principles of Lechmere to the facts here, there is no violation because Paley admitted that he has had access to Respondent's employees since receiving the April 25 letter. Thus this is not one of those rare circumstances where inaccessibility makes ineffective reasonable attempts by the Union to communicate with Respondent's employees. Lechmere, supra at 537.

Moreover, even were I to find that Lechmere did not apply to this case, I would still not find a violation of Section 8(a)(1) in the April 25 letter from Respondent's attorney. When read in light of Will's credited version of the April 16 telephone conversation, the letter does not deny access, but merely limits access as to time and place. Will specifically acknowledged in his conversation with Paley that the Union had a right to communicate with Respondent's employees and assured Paley that he did not want to interfere with that right. Rather, he expressed his legitimate concerns regarding safety and liability issues associated with union representatives talking to employees on worksites while they were working and assisting Respondent's employees in performance of work tasks. The limitations imposed on Paley by Respondent are consistent with precedent allowing an Employer to limit union solicitation to times when employees are not engaged in work activities. As there is no allegation or evidence that Respondent was discriminatorily motivated in promulgating these limitations, Respondent did not violate the Act by its attorney's April 25 letter.

<sup>&</sup>lt;sup>3</sup> The rights of nonemployee union organizers to access to an employer's premises and employees is not to be confused with the rights of such organizers to be free from discrimination when they become applicants for employment. See *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995).

<sup>&</sup>lt;sup>4</sup> It is established Board law that an employer may limit the union solicitation rights of employees to those periods during the workday when the employees are properly not engaged in performing work tasks, provided it does not discriminate between protected activities and other forms of solicitation. See, e.g., *Beth Israel Hospital*, 437 U.S. 483 (1978); *Our Way, Inc.*, 268 NLRB 394 (1983). Certainly, nonemployee union organizers have no greater rights to engage in such solicitation.

#### B. Refusal to Hire and/or Consider for Hire

Paley, the Union's organizer, testified that he attempted to organize Respondent's employees in 1995, after being approached by one of Respondent's employees. He wrote to Respondent's president, Will, on May 24, 1995, requesting a meeting to discuss recognition. Such a meeting was held on June 1, 1995, at the Union's office. Paley and representatives of two adjacent locals of the same International Union advised Will that a majority of his employees were interested in union representation and discussed the advantages of union recognition to the Company. Will was noncommittal at this meeting, requesting additional information from the unions which was subsequently submitted. Another meeting was held several weeks later, again without any agreement by Will to recognize the Union. Paley did not testify as to any further contact with Respondent, despite his testimony that Will told Paley at the last meeting that he would get back in touch with the unions.<sup>5</sup> Will admitted meeting with Paley and other union representatives in response to Paley's May 24, 1995 letter and generally corroborated Paley regarding the substance of the meetings. However, Will testified further that he contacted Paley in the early fall of 1995 to inform Paley that Respondent chose not to go union. According to Will, Paley replied that Respondent might as well go union because Paley was either going to make Will a union signatory or find a way to get rid of him. Paley did not specifically deny this conversation, but he generally denied ever threatening to get Will. I credit Will's testimony over Paley's general denial. I find Paley's omission of any testimony regarding the ultimate resolution of his 1995 organizing efforts suspect and Will's account of the conversation in early fall of 1995 generally more reliable.

Paley further testified that, on March 12 or 13, he saw a job order from Respondent at the New York State Job Service office, soliciting applications for the position of electrician at the rate of \$8/hour, up to \$12/hour, depending on experience, with benefits. The job was described as full-time and permanent. No specific educational requirement was listed. The job order did indicate that 12 months' experience was required. The job summary indicated that Respondent sought someone to plan, layout, install and repair wiring, electrical fixtures, apparatus and control equipment; that because Respondent operated a 24hour service, the job would include on-call work after hours and on weekends. The prospective employees were also required to have their own tools. The job order directed interested applicants to contact Peter Will. Paley testified that, as unemployed members came into the Union's office, he asked them if they would be interested in making application to Respondent because Respondent was hiring. Several members in fact filed applications, as will be discussed infra.

Paley testified that he himself went to Respondent's office and submitted an application with a copy of his resume. The application is dated March 15. On the application, Paley stated that he had an Associate's degree in electrical construction and maintenance from Hudson Valley Community College and finished second in his class in the Local Union's apprenticeship program. He identified himself as a union organizer, with "great knowledge of the needs of my fellow electricians and employers." His resume lists his current employment as the

Union's organizer and past employment as an instructor in the Union's apprentice training program and as an electrician with union contractors, including several specializing in fire alarm and security system installation and maintenance. Paley testified that he was also required to take a brief written examination. He got the application and test from the secretary in the office, later identified as Respondent's office manager, Diane Logan, and he returned the completed documents to her. He did not have an interview nor talk to Will at that time.

According to Paley, he telephoned Respondent on or about March 29 and spoke to Will about the status of his application. Paley testified that Will asked him if he was still with the Union and Paley replied that he was. Will then said he didn't have any work for Paley inside, but if something came up, "we could talk." Paley responded that he wasn't applying for an inside position, that he was applying for the electrician's job Will was advertising for. Will told Paley he was overqualified for that position, to which Paley replied: "I'm an electrician, and you're looking for help, and I would be interested in taking that position." Paley did not testify to any further response from Will, but it is undisputed that he was not hired by Respondent. Will testified that he telephoned Paley within days of receiving his application. According to Will, he asked Paley why Paley was applying to work for Respondent in light of his current position with the Union that did not require Paley to work in the field. Paley replied that he was interested in working in the field and that he would work for Respondent for any amount of money. These two accounts of the conversation are generally consistent, despite some variation in the parties' recollections. It is significant that, based on Paley's own recollection of the conversation, Will did not refuse to consider Paley, despite his apparent suspicions regarding Paley's intentions in applying for a field position. On the contrary, Will told Paley, "we could talk" if something came up which matched Paley's qualifications

As noted above, Paley advised unemployed members of the Union about the job order and invited them to apply to Respondent. Six members in fact applied, four of whom are alleged discriminatees who testified at the hearing.<sup>6</sup> All four testified that Paley informed them that Respondent was hiring when each had visited the union hall in search of work. They generally denied being given any specific instructions by Paley regarding how to fill out their applications. Each testified he was out of work at the time he applied and would have accepted a job at \$8/hour if offered by Respondent. All four witnesses testified to similar experiences when they went to Respondent's offices to apply for work on various dates in March. Three of the four were given applications and a brief test to fill out by Logan. The fourth, Edward Ruede, received his forms from a gentleman identified as Brian Painter whose position with Respondent was not disclosed. They completed these forms in a small room off the lobby and returned the applications to Logan or Painter, as the case may be. None were interviewed or had any discussion with a representative of Respondent about their qualifications, the nature of the job or the compensation being offered by Respondent and none was contacted by Respondent thereafter. Only one of the four, Ruede, followed up his application with a phone call. Ruede testified that he called Re-

<sup>&</sup>lt;sup>5</sup> Despite its claim of majority support among Respondent's employees, the Union apparently did not pursue its organizing drive as there is no evidence a petition was ever filed by the Union with the NLRB.

<sup>&</sup>lt;sup>6</sup> Paley identified two other members who applied, Brian Brown and Tom Powers. Neither is alleged as a discriminatee and the General Counsel specifically disavowed any claim on behalf of these applicants.

spondent's office on two occasions and inquired of Logan as to the status of his application. The first call was approximately a week after he applied at which time he was told no one had been hired yet and that they would get back to him. His last call was about 1-1/2 months later when he was given a similar response and was also informed that his March application was still good. In both instances, the information given to Ruede was correct, as the record shows that no one was hired until late May.

Frank Muia and David Haggerty were 3d-year apprentices who had been out of work approximately 1 month when they applied. Each had earned \$10.50/hr. at his last job with the Union. They went to Respondent's office together on March 13. Both were wearing IBEW hats at the time. The only indication of union membership or activity on their applications is their identical reference to "Local 724 3d-year apprentice" in response to a question regarding "specialized training, apprenticeship, skills, and extra-curricular activities." Although both testified that they had experience performing the kind of work Respondent did, this is not clear from their applications. Muia and Haggerty took their tests together in the room off the lobby. They specifically denied discussing their answers or copying from one another. Logan testified, as a witness for Respondent, that she heard Muia and Haggerty talking while they were filling out the forms. She did not recall what they were saying. She also testified that, while Muia and Haggerty were taking the test, she had to go into the room to put a folder away and observed that one of the test was pointed facing the back wall, not in a position one would expect if someone were writing on it. She did not testify that she observed them copying from one another or otherwise cheating. Logan testified she informed Will of her observations later that day.

Will testified that he reviewed Muia's and Haggerty's applications and tests shortly after Logan informed him of her suspicions. By comparing their answers to various questions, he reached the conclusion that they had cheated on the test. At the hearing, Will cited specific examples where the answers on both tests are not only identical, but are not the answer one would typically expect to find. The undersigned reviewed tests of other applicants which are in evidence and these generally corroborate Will's testimony that the answers which are identical on Muia's and Haggerty's tests are not the answers routinely given to those questions. This lends credibility to the testimony of Will and Logan that Muia and Haggerty, at the very least, consulted with one another and helped each other on the test. Will testified that he did not give any further consideration to hiring Muia and Haggerty because of his belief that they had cheated and therefore could not be trusted to represent Respondent in dealings with its customers. I find this explanation credible.

Ruede is a journeyman electrician with 10 years' experience. When he applied on March 8, he had been out of work for approximately 4 months and his unemployment benefits were running out. There is no specific reference to the Union or union membership anywhere on his application, although he reports "4 years training JATC" in the space for specialized

skill, etc. He was not wearing a union hat or other identifying apparel which would have revealed his union membership or sympathies. The last two jobs he listed under experience were short-term jobs in Pittsburgh and Buffalo, paying \$23.70 and \$21.90/hour respectively. Unlike Muia and Haggerty, Ruede did specifically identify the kind of work he did at each job listed and further stated on his application: "have worked residential, commercial and industrial for ten years. [h]ave seen and done about everything." Although the General Counsel argues that Ruede's union affiliation would be apparent from the names of employers he'd worked for, I find insufficient evidence that Respondent had knowledge of Ruede's union membership, activities or sympathies based on the application alone. See *BE & K Construction Co.*, 321 NLRB 561 fn. 2 (1996).

Terrance Ray is a journeyman electrician with 14 years' experience. When he applied on March 18, he had been out of work for about 2 months and his unemployment benefits also were running out. In the section of the application for "additional information you feel may be helpful to us in considering your application," Ray wrote: "union electrician out of work, no unemployment will work for or at any rate, or time." Although Ray testified that he had experience in residential and service work, and had long-term employment in his past, his application does not contain this information.

Will testified that he placed the job order, as well as a newspaper advertisement, in early March because he anticipated a job in Saratoga which was expected to start in the spring. According to Will, he had been told he was the low bidder and assured by the contractor that he had the job. It was his belief that he would need six to eight electricians with construction experience and helpers to staff this job. Although the record shows that he received approximately 25 applications and resumes in response to the March solicitation, he did not hire anyone at that time because the Saratoga job never materialized.

Will conceded on cross-examination that another purpose in advertising for electricians in March was to build up a pool of applicants and to see what was available in the Capital District labor market in the event he had openings in the future. Such openings in fact occurred in May, when Respondent hired three individuals to fill two positions as service technician. Will described this position as someone who would respond to calls from residential and commercial customers for service. The employee would be given three or four calls to make in a day and was responsible for assessing the situation, estimating the job, negotiating a price with the customer and collecting payment. The work required no more than a basic knowledge of electrical work. According to Will, service work was the majority of its business in 1996.

Will testified that, although the need for a service technician was different than the need which led him to solicit the applications received in March, he reviewed those applications in order to fill these positions rather than place a new ad or job order. He was looking for someone with a broad range of knowl-

On cross-examination, Will acknowledged that he did not volunteer this reason when he gave an affidavit as part of the investigation of the charge. I find that this oversight does not undermine the credibility of Will's testimony at the hearing because his testimony is corroborated by an objective comparison of Muia's and Haggerty's tests.

<sup>&</sup>lt;sup>8</sup> Because Ruede is named in the charge filed by the Union on July 8 and served on Respondent the same day, Respondent clearly had knowledge by that date.

<sup>&</sup>lt;sup>9</sup> The first individual hired for this position, Christensen, was terminated after about 1 week because, according to Will, he had overstated his qualifications.

edge and experience who could do service work, as well as construction, and could work alone. He also sought someone who could interact with customers and be trusted to negotiate and collect payment on behalf of Respondent. Will testified that when he reviewed the applications, he generally looked at the experience section first, but considered the overall picture of the applicant, including education, special training, duration of employment with past employers, and current wage rate. With respect to the latter factor, Will testified that, based on experience, an individual would not be happy or last in a job if they were required to accept much less than they were used to earning.

The first two service technician's hired were selected from the March applications. The first, Michael Christensen, was hired because he reported experience working as an appliance repairman and troubleshooter for retail appliance stores. Will testified that this was similar to the service work that Respondent did. As noted above, Christensen was terminated in about a week when it became apparent he had overstated his qualifications. According to Will, Christensen was not capable of performing independently in the field. Will testified that he hired Geoffrey Goyette to replace Christensen based on Goyette's education and training, his experience primarily in residential work and the continuity of employment with his two previous employers. Will conceded that Goyette had been earning more than Respondent was offering, but also noted that he was seeking employment after having to relocate to the Albany area because of his wife's job transfer. It is noted that Govette specifically identified his last employer as "non-union" on his application. The individual hired for the other service technician position was not selected from the pool of March applications. Jerry Cecchini was a walk-in who filed his application on May 28 and was hired to start on May 30. Contrary to Will's testimony, it appears more likely that Cecchini was hired to replace Christensen because of the timing of his application in relation to Christenson's termination. Moreover, the undisputed evidence establishes that Goyette had already been hired before Christensen's termination. There is no evidence that Will considered any of the March applicants before hiring Cecchini

The record reflects that Respondent next hired someone on August 5. Will testified that he hired Jerry Montoya for an electrician position at \$12/hour based on a recommendation from a longtime employee. Montoya had not applied in response to the March advertisement. Although Will testified that he had no specific job opening at that time, he testified at another point that he had interviewed Andrew Desrosiers in July and called in Bob Kwiatkowski for an interview on July 20. Desrosiers was eventually hired as an electrician at \$13/hour on October 28, while Kwiatkowski did not show up for his interview. Both individuals submitted applications in response to the March advertisement. I find, contrary to Respondent's assertion, that Respondent did review at least some of the March applications in July before hiring Montoya.

Respondent did not hire again until October when he hired two helpers with little or no electrical training or experience at \$8/hour. According to Will, these positions were entry level jobs for someone to essentially carry material to a job and assist the electrician. Helpers, unlike service technicians, would never be sent out alone. Will testified credibly that in hiring employees, he likes to maintain a mix of experienced electricians who can do any kind of work, less experienced individu-

als who can independently handle service calls and raw employees he can train in the business from scratch, with helpers falling into the latter category.

Neither of the individuals hired as helpers in October had applied in March. Their applications were submitted shortly before the positions were filled. There is no evidence that Respondent considered any of the March applications before hiring these two helpers.

As noted above, Desrosiers was the next individual hired by Respondent. Desrosiers had applied in response to the March advertisement and was interviewed in July, but not hired at that time. Will testified that he was impressed with Desrosiers qualifications, in particular his management and computer experience and decided to keep him in mind if he had another opening in the future. Desrosiers was the last of the March applicants to be considered for, or hired by Respondent. Although Respondent hired two helpers, a service technician and an electrician in 1997, all individuals hired had applied about the time Respondent was seeking to fill these positions. There is no evidence that Respondent considered any of the March applicants to fill these positions. Will testified that he generally considers an application as active for about 6 months. This testimony is consistent with the practice demonstrated by the evidence in the record.10

As noted above, Will did not consider Haggerty or Muia for any positions because they were suspected of cheating. These were the only two union applicants whose level of training and experience and earnings history were most like the individuals Respondent sought for service technicians. Although Will testified that he had no specific recollection of reviewing the applications of Ruede and Ray before the hearing, he testified that he did not consider hiring them essentially because of their prior wage rates listed on the applications, which was considerably higher than Respondent was willing to pay for a service technician. Will also testified that their applications did not indicate any long-term employment nor disclose their employment history beyond the last year. Finally, in Ruede's case, Will testified that the type of work identified on his application, i.e., work on construction and in factory settings, was not the type of work Respondent generally performed. With respect to Paley, Will testified that he did not consider hiring him for the service technician job or any other openings because of his past experience with Paley in 1995. As noted above, Will credibly testified that Paley had threatened to get rid of his business if Respondent did not become a union contractor. Will reasonably believed that Paley could not be trusted as an employee to interact with Respondent's customers in the best interests of Respondent.

As with all cases turning on employer motivation, the General Counsel here must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in Respondent's refusal to hire and/or consider for hire the five alleged discriminatees. Only upon such a showing does the burden shift to Respondent to establish that it would have taken the same action even in the absence of protected conduct. *Fluor Daniel, Inc.*, 304 NLRB 970 (1991); *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The essential elements

<sup>&</sup>lt;sup>10</sup> Although Desrosiers was hired more than 6 months after he applied, Will considered him for hire and interviewed him within 6 months, deciding to keep him in mind for the next opening.

of a prima facie case are protected activity, knowledge of that activity by Respondent, animus, timing, and, in a refusal to hire case, the availability of jobs for the applicants. *Bay Electric, Inc.*, 323 NLRB 200 (1997); *WestPac Electric*, 321 NLRB 1322, 1346 (1996); *Bay Control Services*, 315 NLRB 30 (1994). In *Fluor Daniel*, supra, the Board noted that motive may be inferred from the total circumstances proved and that, under certain circumstances, animus will be inferred in the absence of direct evidence. Having considered the evidence in the record and the inferences which might reasonably be drawn from this evidence, I find that the General Counsel has not established that the union membership or activity of any of the applicants had anything to do with their not being hired, or considered for hire.

At best, the General Counsel established that these five individuals, four of whom identified themselves with union affiliations on their applications, applied for jobs with Respondent in response to an advertisement for electricians and that none were hired. The record also establishes that no one else was hired in response to that advertisement because the job for which Respondent sought electricians did not materialize. Several months later, when Respondent hired individuals to fill a different position than that previously advertised, it reviewed applications submitted at the same time as the discriminatees and hired individuals without any union affiliation. There is also evidence that Respondent reviewed and considered applications received in March to fill other positions in August and October, but that none of the discriminatees were hired for these positions. However, there is no evidence in the record that Respondent bore animus against the union. At most, the credited evidence establishes that Respondent refused to voluntarily recognize the Union a year earlier and requested that the union organizer limit his contacts with Respondent's employees to times and places when they are not working. It has been held that an Employer's refusal to enter into a prehire agreement does not establish animus. See Fluor Daniel, Inc., supra at 976. Moreover, based on my findings above regarding the allegedly unlawful denial of access, there is no independent violation of Section 8(a)(1) which would establish animus.

The General Counsel argues that animus and unlawful motivation are established by the pretextual nature of the reasons advanced by Respondent's president Will for hiring nonunion as opposed to union applicants. In making this argument, the General Counsel cites only a few of the criteria mentioned by

Will in his testimony, i.e., earning history and education and training. However, in his testimony, Will cited a number of factors he considered in reviewing applications, none of which was determinative, and further testified credibly, as to the difference between the positions of helper and service technician, which comprised the bulk of the hiring after March, and the electrician position advertised in March. Paley, Ruede, and Ray were clearly overqualified for service technician and helper, when compared to the individuals whom Respondent hired to fill these positions. Will's testimony that an individual used to earning \$20/hour or more will be unhappy in a position paying \$8–10/hour and is not likely to remain with Respondent is credible. Certainly, none of the individuals hired as a service technician or helper had as big a discrepancy between their prior earnings and the salary offered by Respondent. As noted above, the asserted reason for refusing to consider hiring Muia and Haggerty for service technician or any other position, has been found not to be pretextual.

The General Counsel also concedes that, of 25 applications received in response to the March advertisement, including those of the 5 alleged discriminatees, only 3 were ever hired, and a fourth was called for an interview. With the exception of Desrosiers, all individuals hired after May applied at the time Respondent was hiring and there is no evidence that Respondent considered any of the March applicants in filling these positions. This is similar to the "gate hiring" practices found not to be discriminatory in other cases. See Dockendorf Electric, Inc., 320 NLRB 4, 7-9 (1995); Bay Control Services, supra, 315 NLRB at 35. Thus, there is no evidence that any of the five union applicants were treated differently than others who applied at the same time. Based on the totality of circumstances, I am unable to find that the union affiliation of the five alleged discriminatees played any part in Respondent's review or consideration of their applications. Industrial Construction Services, 323 NLRB 1037 (1997); Bay Electric, supra at fn. 1; Belfance Electric, supra.

# CONCLUSION OF LAW

The Respondent has not violated the Act in any manner encompassed by the complaint.

[Recommended Order for dismissal omitted from publication.]